APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

B. H. MORTON and THOMAS KENT,	)	No. 81-3194
Plaintiff-Appellants,	)	D.C. No. 79-1199
v.	)	OPINION
ZIDELL EXPLORATIONS, INC.	)	
Defendant-Appellee.	)	

Appeal from the United States
District Court for the
District of Oregon
Edward Leavy,
United States Magistrate, Presiding

Before: SNEED and SKOPIL, Circuit Judges, and COUGHENOUR,* District Judge

PER CURIAM: Morton and Kent ("appellants"), owners of a tugboat, contracted with Zidell Explorations,

*The Honorable John C. Coughenour, United States District Judge for the Western District of Washington, sitting by designation.

Inc. ("Zidell"), a shipyard, to convert their tug into a fish-processing vessel. During the course of the conversion the ship was almost completely destroyed by fire. Appellants sued for negligence, judgment was entered for Zidell, and Morton and Kent appealed. Two questions are presented here. First, is an exculpatory clause in a marine repair contract enforceable under the Supreme Court's decision in Bisso v. Inland Waterways Corp., 349 U.S. 85 (1955)? We conclude that it is. Absent evidence of overreaching, exculpatory clauses in ship repair contracts are enforceable in this Circuit. Hall-Scott Motor Car Co. v. Universal Insurance Co., 122 F.2d 531 (9th Cir.), cert. denied, 314 U.S. 690 (1941). Second, did the trial court err in allowing Zidell to introduce evidence that appellants' vessel was insured at the time of the fire? We conclude that it did not. We affirm.

I. FACTS AND PROCEEDINGS BELOW

Appellants purchased an old tugboat and orally contracted with Zidell, a marine repair and construction company,

to convert it into a fish freezer-processor for use in the Bristol Bay fishery. The conversion work began in the fall of 1978. By January 1979 appellants owed Zidell approximately $200,000 for work performed. Zidell refused to continue with the work until arrangements were made to eliminate this debt and to ensure partial payments as future work progressed. To that end the parties, on January 25, 1979, executed a written fixed-price contract to govern the balance of the conversion. The agreement, drafted by Zidell's attorney, contained a "red-letter" clause exculpating Zidell from "all risks of loss or damage . . . under any circumstances whatsoever."

The jury found that the written contract between the parties was in effect on May 2, 1979, the date of the fire. There was evidence presented at trial from which the jury could conclude that the "red-letter" clause was placed in the first paragraph of the contract to assure its prominence, that appellants were knowledgeable businessmen, and that they read and signed the

agreement without expressing any reservations.

Appellants did not secure interim financing and satisfy their $200,000 indebtedness to Zidell until early March 1979. Under the contract, Zidell was not obligated to proceed with the conversion until such payment was made and, in fact, Zidell stopped work on the boat until appellants brought the account current in March, whereafter work resumed.

In January 1979 appellants purchased a builders' risk insurance policy on the vessel. Although it was undisputed that the policy became effective on January 26, 1972, the day after the execution of the contract for the vessel's conversion, there was conflicting evidence presented on appellants' motives for acquiring the insurance, and on when appellants first sought to obtain the policy.

On May 2, 1979, while appellants' vessel was lying at the Zidell dock, a Zidell employee welding on one of her bulkheads ignited combustible material on the opposite side of the bulkhead,

causing a fire which nearly destroyed the vessel. Appellants sued Zidell for negligence, alleging damages of approximately $300,000 to the vessel and other personal property, plus additional damages of $1,200,000 for loss of use of the vessel in the Alaska fishing season immediately following.

The parties stipulated to a bifurcated trial before United States Magistrate Edward Leavy, with the liability issues tried first to a jury. In answers to special interrogatories the jury found that Zidell's negligence was 96 percent responsible for the fire, and that appellants' negligence accounted for the balance. The jury also answered a special interrogatory concerning the efficacy of the January 25th contract, and found the agreement to have been effect at the time of the May 2nd fire. Appellants moved for a judgment notwithstanding the verdict on the grounds that the "red-letter" clause was unenforceable as against public policy, and that the clause could not exculpate Zidell from its own negligence because it did not specifically refer to negligence or

tort liability. Appellants did not renew the latter argument on appeal.

Magistrate Leavy, applying federal admiralty law, denied the motion for judgment n.o.v. In so doing he found expressly that the appellants were not the victims of overreaching or unequal bargaining power. He further found that no evidence had been adduced from which it could be concluded that Zidell wielded any monopoly power in the shipyard business, nor which would allow the conclusion that appellants could not have had the subject repairs performed elsewhere. Accordingly, appellants' motion was denied and judgment entered for Zidell. Morton and Kent appeal from that judgment.

II. THE "RED-LETTER" CLAUSE

The Supreme Court has held a "red-letter" clause in a tugboat towing contract to be void as against public policy. Bisso v. Inland Waterways Corp., 349 U.S. 85 (1955); Boston Metals Co. v. The S/S Winding Gulf, 349 U.S. 122 (1955); Dixilyn Drilling Corp. v. Crescent Towing and Salvage Co., 372 U.S. 697 (1963).[3] In Bisso, Inland

Waterways contracted to tow Bisso's oil barge up the Mississippi. The barge collided with a bridge pier and sank. Bisso sued, alleging negligent towing. Inland sought to avoid liability, in part, by invoking a provision in the towage contract which provided that Bisso assumed "sole risk" of the towage. The Supreme Court, appling federal admiralty law, invalidated the clause. Mr. Justice Black, writing for the Court, stated the reasons for the invalidation: "(1) to discourage negligence by making wrongdoers pay damages, and (2) to protect those in need of goods or services from being overreached by others who have power to drive hard bargains." 349 U.S. at 91. This Court has applied such a rule in the context of towage contracts. D. R. Kincaid, Ltd. v. Trans-Pacific Towing, Inc., 367 F.2d 857, 858-59 (9th Cir. 1966).

In their arguments both here and below the parties hotly dispute the applicability of Bisso and its progeny to shipyard repair cases. Appellants rely on First Circuit authority which

invokes Bisso principles in invalidaing "red-letter" clauses, while appellees seek support from Fifth Circuit decisions which uphold exculpatory clauses in the absence of evidence of overreaching. In declining to invalidate the "red-letter" clause in the contract at issue here, the trial court, finding no evidence of overreaching, followed the Fifth Circuit.

This Circuit has addressed and resolved this question. In Hall-Scott Motor Car Co. v. Universal Insurance Co., 122 F.2d 531 (9th Cir.), cert. denied, 314 U.S. 690 (1941), the Court framed the issue as follows: "Can the parties to a maritime contract to repair a vessel validly stipulate that the repairer may be freed from the consequences of his negligent damage to the vessel in his custody for repairs?" 122 F.2d at 534. The Court concluded that they could. The relevant facts of that case are essentially identical to those before the Court here. The owner of a pleasure boat had delivered it to Hall-Scott for the installation of a new engine, under a contract which provided

in part that "Hall Scott will not be held responsible for any damage to [the vessel] . . . while the engine installation is being made." 122 F.2d at 533. During the course of the conversion the boat was virtually destroyed by fire. The owner's insurer paid him and sued Hall-Scott for, inter alia, negligence. This Court, applying federal admiralty law, reversed a judgment for the insurer and ordered judgment for Hall-Scott on the basis of the "red-letter" clause. It held that a clause which exculpates a party to a contract from his own negligence is valid if not contrary to public policy.

Although Hall-Scott predates Bisso, it is still good law in this Circuit. Bisso merely reaffirmed the rule applicable to tugboat towing established in The Steamer Syracuse, 79 U.S. (12 Wall.) 167 (1870), and Compania de Navegacion, Interior, S.A. v. Fireman's Fund Ins. Co., 277 U.S. 66 (1928). 349 U.S. at 90. The Bisso Court also distinguished Sun Oil Co. v. Dalzell Towing Co., 287 U.S. 291 (1932), which had upheld a clause exculpating tugboat owners from

liability for negligent pilotage by an employee. 349 U.S. at 92-94. The Hall-Scott decision carefully considered those three earlier cases in concluding that public policy did not require the invalidation of that "red-letter" clause. 122 F.2d at 536-37. Bisso merely reaffirmed the rule for towage contracts. It did not overrule Hall-Scott sub silentio.

Although contract clauses which result from overreaching will not be enforced, the trial court concluded that appellants had not been overreached. Such a finding will not be disturbed unless clearly erroneous. See Anaconda Building Materials Co. v. Newland, 336 F.2d 625, 628 (9th Cir. 1964). Appellants argue that because their long-term financier insisted that the conversion be completed by June, and because Zidell would not release the vessel until appellants' $200,000 indebtedness was satisfied, they had no choice but to sign the written agreement. However, the evidence indicates that in signing the contract appellants neither objected to nor

mentioned the "red-letter" clause. Moreover, any economic pressure to sign the contract was the product of appellants' own failure to maintain the payment schedule established by the original agreement. Finally, had appellants in fact felt victimized by the terms of the January contract there was nothing to prevent them from taking their vessel to another yard in March, when they brought their account current. Accordingly, we affirm the trial court's finding that appellants were not overreached. On these facts it is beyond the province of this Court to imply limitations or conditions on the exercise of a power to allocate risks so unmistakably expressed. We therefore reaffirm our ruling in Hall-Scott and hold that absent evidence of overreaching, "red-letter" clauses in ship repair contracts will be enforced. In arriving at this result we emphasize that our holding is a narrow one; in so ruling we do not purport to circumscribe Bisso's continued application to towage cases.

III. THE INSURANCE ISSUE

At trial the Magistrate permitted Zidell to elicit evidence that appellants had obtained builders' risk insurance on their vessel sometime prior to the fire. He did so over appellants' objection that any probative value which the evidence might have had was substantially outweighed by its potential for prejudice. The trial court allowed appellants a continuing objection, and cautioned the jury to limit its consideration of the insurance evidence to the issue of whether there existed a binding contract between the parties.

Appellants took the position at trial that there was never a mutually agreed-upon written contract between the parties and, if there was, that Morton and Kent, upon leaving the office in which the agreement was signed, did not believe it to be binding. To refute these contentions Zidell adduced evidence that the principal agreement required appellants to obtain builders' risk insurance to diffuse the risk which the contract imposed on them, that the terms of the agreement signed on January

25th had essentially been agreed upon sometime prior to that date, and implied that it was more than a mere coincidence that the effective date of the insurance policy was the day after the contract's execution.

We conclude that the Magistrate ruled properly in finding the evidence relevant and probative. Evidence of liability coverage is admissible if offered for relevant purposes, Fed. R. Evid. 411. Here the jury was entitled to consider evidence relevant to the existence and binding effect of the contract. Any prejudice to appellants was outweighed by the probative value of the evidence, and was minimized by the Court's cautionary instruction. We conclude that the appellee was properly allowed to introduce evidence of appellants' risk coverage for the limited purpose of proving that appellants deemed themselves bound by the contract.

AFFIRMED.

060/F

FOOTNOTES

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1. The exculpatory clause is contained in the first paragraph of the agreement. It reads, in its entirely:

> "1. Pending delivery of the Vessel by Second Party [Zidell] to First Party [Morton-Kent], all risk of loss of or damage to the Vessel shall be upon First Party [Morton-Kent], and all and any insurance affording coverage for perils to which the same may be exposed pending such delivery, procured or provided by First Party [Morton-Kent], shall inure to the benefit of First Party [Morton-Kent]. Second Party [Zidell] shall not, under any circumstances whatsoever, be chargeable with or liable for damages, direct or consequential, sustained by First Party [Morton-Kent] by reason of the loss of, damage to, or delays in delivery of, said Vessel."

2. The contract contained a choice-of-law clause which provided that Oregon law would govern, "subject to the jurisdiction of the Courts of the United States as to matters purely maritime in nature." The Magistrate applied federal admiralty law, and the parties do not challenge that application. We note in

passing that it has long been held that ship repair or conversion contracts are governed by federal maritime law. See, e.g., New Bedford Drydock Co. v. Purdy, 258 U.S. 96 (1922).

3. Boston Metals and Dixilyn Drilling merely reaffirmed and applied Bisso.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

B. H. MORTON and THOMAS KENT,	)	Civil No. 79-1199
Plaintiff,	)	
v.	)	OPINION
ZIDELL EXPLORATIONS, INC.	)	
Defendant.	)	

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LEAVY, Magistrate

Plaintiffs move for judgment NOV after the return of a special verdict by the jury. The parties have stipulated to proceedings before a United States Magistrate.

Plaintiffs filed this action seeking damages stemming from the burning of their boat while it was being worked on at defendant's shipyard. The jury found that the negligence of defendant was ninety six percent responsible for the fire and the plaintiffs' negligence was four percent responsible. The jury also found that a written contract containing an exculpatory clause was in effect at the time. The issue raised by this motion for judgment NOV is the legal effect of this exculpatory clause which purports to relieve defendant of liability. Defendant argues that the clause protects it from any liability for negligence in this action, and plaintiffs naturally contest this. The clause reads as follows:

> 1. Pending delivery of the Vessel by Second Party to First Party, all risk of loss or damage to the Vessel shall be upon First Party, and all and any insurance affording coverage for perils to which the same may be exposed pending such delivery, procured or provided by first party, shall inure to the benefit of First Party. Second Party shall not

> under any circumstances whatsoever, be chargeable with or liable for damages, direct or consequential, sustained by First Party by reason of the loss of, damage to, or delays in delivery of said Vessel.

Plaintiffs argue first that the clause is invalid as a matter of public policy and second, assuming it is not against public policy, it is ambiguous and unenforceable because it does not specifically refer to liability for negligence or tort.

If the case involved a towing contract, the clause would most likely be invalid as against public policy under federal law. Bisso v. Inland Waterways Corp., 349 U.S. 85 (1955); Boston Metals Co. v. Winding Gulf, 349 U.S. 122 (1955); Dixilyn Drilling Corp. v. Crescent Towing and Salvage, 372 U.S. 697 (1963). And although the contract contains a clause directing that Oregon law should be applied, such clauses cannot be used to defeat a principle of federal public polcy such as that stated in Bisso. The Bremen v. Zapata Off-Shore Co., 407 U.S. 1 (1972).

However, this contract involves a shipyard. It is not clear that the Bisso policy extends to shipyards. The Court in Bisso held that exculpatory clauses in towing contracts were against public policy because they encouraged negligence and because tow operators were often in a position to exact such clauses due to their favorable bargaining position. While the opinion did refer to bailees as among the special group for whom such clauses would not be enforced, it did not discuss the issue in any significant manner, nor was the issue before the Court. The circuits have differed in their response to Bisso insofar as shipyards are concerned.

The First Circuit left the issue open in Firemen's Fund American Ins. Co. v. Boston Harbor Marina, Inc., 406 F.2d 917 (1st Cir. 1969). Later, a district court ir the First Circuit refused to enforce a shipyard's "red letter" clause saying "Federal law also disregards liability limiting provisions in bailment agreements [Citing Bisso]." Fireman's Fund American Ins. Co. v.

Captain Fowler's Marina, Inc., 343 F. Supp. 347 (D. Mass. 1979).

The other circuit whose decisions have been cited is the Fifth Circuit. The approach there has been to enforce the clauses if there is no evidence of overreaching. In Alcoa Steamship Co. v. Charles Ferran and Co., 383 F.2d 46 (5th Cir. 1967), the Court enforced a limitation of liability of $300,000. The Court reasoned that liability for $300,000 would deter negligence and that plaintiff's bargaining position was not inferior to defendant's. While the case is distinguishable from this action on the basis of the $300,000 limitation, the opinion gives the strong impression that the result would have been no different, especially where it states that plaintiff's bargaining position was not inferior. In Bisso, the Supreme Court never addressed the individual bargaining position of the parties and made its decision on the basis of general public policy. The Fifth Circuit was therefore clearly not extending Bisso to shipyards. The court in Hudson Waterways Corp. v. Coastal

Marine Services, Inc., 436 F. Supp. 597 (E.D. Texas 1977) also enforced an exculpatory clause. It found that the policy considerations present in Bisso were not present. It also examined the individual transaction for fairness and was impressed by the fact that plaintiff and defendant had been doing business for over twenty years and that this was the first instance of negligence by defendant. The other case cited by plaintiff is Todd Shipyards Corp. v. Turbine Service Inc., 467 F. Supp. 1257 (E.D. La. 1978). There the court, after citing the above cases from the Fifth Circuit, refused to enforce an exculpatory clause on the grounds that defendant was not only negligent, but was grossly negligent. The jury in the case at bar was not asked to consider the issue of gross negligence and the court cannot now indulge in additional fact-finding. Plaintiffs are therefore not entitled to the benefit of Todd.

I find the approach of the Fifth Circuit more persuasive. There has been no evidence that the policy considerations of Bisso apply to shipyards. In

particular, there has been no showing that shipyards tend to have a monopolistic hold on the market or that a shipowner is severely restricted in choosing a shipyard. I find that Bisso does not extend to shipyards and that the exculpatory clause is not void as against public policy absent some showing of overreaching or unequal bargaining power.

Plaintiffs are not convincing in arguing that they were in an inferior bargaining position. Again there is no evidence the defendant had a monopoly or that plaintiffs could not have had the repairs to their boat done elsewhere. After repairs had been commenced, and monies became payable, plaintiffs cannot complain that defendant would not release its lien without payment. The written contract here at issue was apparently entered into after payment problems arose, and it allowed defendants to continue work. This is what the parties bargained for at that time. I find that plaintiffs were not the victims of overreaching.

The issue is then whether the clause unambiguously states that defendants are being relieved of liability for negligence. The principal language states that defendants will not be liable for loss "under any circumstances whatsoever." I find that this language is sufficiently clear to drive home to the plaintiffs that defendant was not to be liable even for its own negligence. Negligence is not so unusual or remarkable that it is not within the reasonable scope of the words "any circumstances whatsoever."

Plaintiffs argue that the clause is ambiguous because it does not specifically refer to torts such as negligence and does not contain any tort terminology. However, no case is cited where a clause was invalidated solely for failure to contain such terminology even though it otherwise satisfactorily gave notice of its exculpatory nature. In the airline context, the Ninth Circuit held that a clause was not invalid for failure to contain tort words (although it was invalid as against public policy). Northwest Airlines Inc. v. Alaska

Airlines, Inc., 351 F.2d 253 (9th Cir. 1965). The Ninth Circuit did approve a clause in Marr Enterprises Inc. v. Lewis Refrigeration Co., 556 F.2d 951, 956 (9th Cir. 1977) on the grounds that the clause specifically referred to negligence. However, it was not stated that the clause would have been disapproved even if it had been clear in its import, but did not have the tort words. I conclude that such magical tort words are not required where an exculpatory clause, such as the instant one, is otherwise clear about its intended effect. To the extent that its law is persuasive, Oregon would uphold this exculpatory clause. In Atlas Mutual Ins. v. Moore Dry Kiln, 38 Or. App. 111 (1979), the Oregon Court of Appeals upheld a clause which exempted defendant from liability from loss resulting from "any cause." See: K-Lines v. Roberts Motor Co., 273 Or. 242 (1975). I find that the above clause is enforceable and was effective to exempt defendant from liability for negligence such as was found in this action.

CONCLUSION

IT IS ORDERED that plaintiffs' motion for judgment NOV is denied.